NO. 10-218

In the
Supreme Court of the United States

PPL MONTANA, LLC,

PETITIONER,

v.

STATE OF MONTANA,

RESPONDENT.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

SUPPLEMENTAL BRIEF OF PETITIONER

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May 31, 2011

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* In this brief, "App" refers to the petition's appendix. "SApp" is the reply brief's supplemental appendix. "2dSApp" is the supplemental appendix included herein.

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SUPPLEMENTAL BRIEF

The judicial taking effected by the decision below is measured in the tens of thousands of acres. And because the vehicle for this landgrab was federal navigability doctrine, rather than eminent domain, no just compensation will be coming the victims' way. Instead, because the court below concluded that land long thought to be owned by private parties and the federal government has belonged to the State all along, it is petitioner who has been presented with a demand for "just compensation" in the form of a bill for tens of millions in back-rent. The Montana Supreme Court achieved this remarkable result by fundamentally distorting both the federal navigability doctrine and the normal rules of procedure. And it worked this massive landgrab by concluding on summary judgment—in the face of a federal court decree, a "mountain" of opposing expert evidence, and time-of-statehood federal agency reports—that the upper Missouri, Madison, and Clark Fork rivers were navigable in their entirety at Montana's statehood in 1889. App-62, 91.

The United States acknowledges the decision below is infected with fundamental errors. It nonetheless urges this Court to deny review because the federal ox has not yet been definitively gored. The federal government, because it enjoys sovereign immunity and the protection of the federal courts, may yet escape the full consequences of this judicial taking. But that short-sighted view minimizes the departures from federal law and disregards the significant federal interests at stake.

The United States also ignores the impossible position petitioner and other private parties are put in by the combined effect of the decision below and the federal government's view that the decision is both wrong and uncertworthy. The decision below is the state court system's final word on federal navigability law and the ownership of the riverbeds. Private parties face direct and immediate consequences from that definitive state view, as dramatically illustrated by petitioner's obligation to pay the State $40 million in back-rent (plus millions in interest) and potentially millions more in future rent. Pet. 13. At the same time, because the United States maintains the decision below is both wrong and non-binding on the federal government, it continues to charge rent to PPL for the *same* lands the Montana court has deemed state-owned. 2dSApp-4-9. Accordingly, while the United States enjoys the cloak of sovereign immunity and urges this Court to deny review, its position leaves PPL doubly charged by the State and the federal government. That cannot be right. The Court should grant review.

I. The United States' Effort To Downplay The Impact On Federal Interests Exacerbates Problems Faced By Private Parties.

The United States believes the decision below is wrong, but that it does not have a significant enough impact on the federal government to warrant review. About this, the United States is quite candid. Its brief asserts that review is unnecessary "absent some more significant consequence, such as an attempt to apply the decision below more broadly to claim not only back-rent from a private utility, but

title from others, including the federal government." U.S.Br. 15. The United States is not only wrong about the decision's consequences for others, it downplays the extent of the decision's potential impact on federal interests in general and federal lands in particular. *See* 2dSApp-18-22 (describing amount of federal lands at stake); 2dSApp-1-3. The United States can do so because it has the option of asserting sovereign immunity and forcing litigation in federal court. But that is cold comfort to private landowners. And private parties are placed in a particularly untenable position precisely in those river stretches where the federal and state governments now have competing claims to the riverbeds. For that reason, a full understanding of the total riverbed acreage on the upper Missouri, Madison, and Clark Fork to which the federal government claims title is necessary. *See* 2dSApp-18-22. The extent of that claim to federal ownership demonstrates not so much the impact on the federal government as the wide span of riverbeds on which there are now competing claims of federal and state ownership.

1. Contrary to the United States' suggestion, the decision below is not limited to a multi-million-dollar claim of "back rent" against PPL. By its plain terms, the decision awards the State "*title* to the riverbeds of the Missouri, Clark Fork, and Madison," and grants the State control over "the disposition [and] use" of those riverbeds. App-62, 91. Because the State's highest court has determined *as a matter of law* that the rivers were navigable at statehood, the decision has practical, preclusive effect against thousands of private landowners who claim contrary

title, even those (like PPL) with title by federal decree.

Moreover, although the United States speculates the State might not apply the decision "more broadly" to "others," the court below held that state officials have a binding "fiduciary obligation … to seek compensation for the use of state-owned lands." App-68. Wishful thinking about state restraint is especially misguided because, as happened in this case, third-parties can pursue litigation to force the State to exercise its trust responsibility to seek rent. Indeed, the decision below expressly contemplates that "other" water users, such as "irrigators, stockmen, [and] recreationists," will be liable for their use of "state-owned riverbeds," albeit not necessarily "in the same manner as PPL." App-90. That is why organizations representing thousands of Montana farmers and hundreds of water users have filed *amicus* briefs urging this Court to remedy the widespread "devastation … wrought" by the decision below. Farm Bureau Br. 22; MWRA Br. 2-7.

2. Just as the decision below sweeps far more broadly than the United States acknowledges, it also implicates significant federal interests the United States fails to address. Most glaringly, the United States all but ignores the 1910 federal court decree that, after a trial, granted PPL's predecessor title to the same Clark Fork riverbeds the State claims as its own. SApp-8-18. In conflict with the decision below, the federal decree held that "Clark's Fork of the Columbia River at all points in Sanders County, Montana, always was and is a non-navigable, torrential, mountain stream, full of rapids and falls." SApp-3; *see also Montana Power Co. v. FPC*, 185

F.2d 491, 493 (D.C. Cir. 1950) (PPL's Madison river dams are "on concededly non-navigable waters").

The United States likewise says nothing about the 1988 letter expressing the federal government's disagreement with the State's earlier assertions of navigability and noting that the State's "navigable rivers list" unlawfully swept in "some 8 million acres of federally-owned surface" and "hundreds of [federal] mineral leases." 2dSApp-2. Recognizing its "responsibility" to defend federal property interests, the Interior Department warned of the "disquieting" and "enormous" effect the State's navigability claims would have "on the title to thousands of parcels of private land." 2dSApp-2-3. The United States' brief neither acknowledges nor disclaims these declared federal interests.

The United States also ignores the federal War Department declaration and the Army Corps' reports to Congress concluding that for the relevant river segments "commercial navigation" was "entirely out of the question." App-102; App-109 ("utterly unnavigable"). And it offers no response to the serious concern, explained both in the petition and by *amici*, that Montana's approach will inevitably spread to other cash-strapped states and impose substantial burdens on the nation's electric and hydropower industries. Pet. 37; Edison Electric Inst. Br. 8-9.

3. Instead, the United States has taken a not-my-problem stance. But its position exacerbates the problem for everyone else. While the United States enjoys sovereign immunity that allows it to declare the decision non-binding, other affected parties now

face competing, irreconcilable claims of ownership to the same riverbeds. To be clear: the United States continues to assert title to the same riverbeds the Montana court has held belong to Montana. That explains why the United States is unconcerned by the decision below, but it puts others in an untenable position. Indeed, FERC recently sent PPL a "U.S. Lands" usage invoice for 1,300 riverbed acres that the decision below declared state-owned. 2dSApp-4-5. PPL is thus required to pay double rent for the use of the same 1,300 acres: once to the State which claims ownership *because of* the decision below and once to the United States which claims ownership *despite* the decision below.

II. The United States Understates The Conflicts With Precedent.

While the United States acknowledges the court below erred, it contends there is no conflict in authority and the errors were fact specific. U.S.Br. 15. That is untrue. The Montana court did not merely misapply the law to the facts; it fundamentally subverted federal law.

1. The navigability-for-title test and the related equal-footing doctrine establish a "constitutional rule of equity" that must be applied uniformly. *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 88 (1922); *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926). Especially in light of the obvious temptation for state courts to err on the side of state claims to title, this Court has acknowledged its obligation to prevent states from misapplying the test to "destroy a title already accrued under federal

law and … enlarge what actually passed to the state, at the time of her admission." 260 U.S. at 88.

The navigability-for-title test requires navigability to be "determined *upon evidence*," even in circumstances "where the navigability of a river, speaking generally, is a matter of common knowledge." *United States v. Utah*, 283 U.S. 64, 77 (1931) (emphasis added); *id.* at 87 ("[e]ach determination as to navigability must stand on its own facts"); *United States v. Rio Grande Dam*, 174 U.S. 690, 698 (1899) (navigability is a matter "requiring evidence, and to be determined by proof"). That is why this Court has held that the burden of proof falls on the party asserting navigability—contrary to the standard effectively applied below. *See United States v. Oregon*, 295 U.S. 1, 14 (1935); Farm Bureau Br. 14-15. It is also why the *Utah* Court appointed a special master to prepare detailed reports supporting his navigability findings. And it is why title navigability questions are ill-suited to resolution on summary judgment. *See* Professors Br. 18-19.

2. The United States asserts that PPL "overstates the Montana Supreme Court's rationale." U.S.Br. 10. In its view, the Montana court never definitively adopted a whole-river approach; it merely addressed the relevant sections and found them too short to defeat navigability. But the district court *rejected* PPL's position "that the appropriate analysis" requires examining "the *relevant reaches* of the river, not the *entire stretch of the river*." App-138 (emphasis added). And the Montana Supreme Court declared that analysis "unequivocally … correct." App-54, 58. Indeed, it

described *Utah*'s focus on "certain sections of the rivers, *as opposed to the rivers themselves as a whole*," as having "limited applicability." App-59 (emphasis added). As the dissent demonstrated, the majority looked at the "*entire river*," not "particular reaches." App-96.

This whole-river approach conflicts with the section-by-section approach required under this Court's precedents. From *Rio Grande* to *Utah* to *Appalachian*, the Court has applied a fact-intensive inquiry to particular river sections. Pet. 18-26. The United States attempts to distinguish these precedents by emphasizing case-specific reasons why the Court examined particular river sections, but its distinctions miss the point. If the whole-river approach were correct, parties' disputes would *never* focus on particular sections; instead, the parties would dispute and the courts would consider only the navigability of the whole river.

Moreover, as PPL, its *amici*, and the dissent below have all explained, this "short interruptions" exception threatens to swallow *Utah*'s rule. The touchstone for title navigability is not length but whether the relevant river section was "susceptible to being used" in its "ordinary condition" as a "highway[] for commerce, over which trade and travel" could have been "conducted in the customary modes of trade and travel on water." *The Daniel Ball*, 77 U.S. 557, 563 (1871). To be sure, *Utah* recognized that "negligible" interruptions will not prevent a river section from being used as a highway of commerce. Nor do longer non-navigable stretches prevent other parts of a river from being navigable. But nothing allows substantial stretches—similar to

and longer than those considered in *Utah*—to be dismissed as neither navigable nor non-navigable, but as utterly irrelevant. *E.g.*, *Utah*, 283 U.S. at 74, 89-90 (36.5-mile middle reach of Colorado non-navigable; 133-mile lower reach of San Juan non-navigable); *Utah v. United States*, 304 F.2d 23, 24 (10th Cir. 1962) ("no significant part of the river" in 55-mile middle reach of San Juan "was navigable").

That the Montana Supreme Court distorted *Utah*'s "short interruptions" language is evident from its bare conclusion that the Missouri River's 17-mile Great Falls stretch is "merely a short interruption." App-57, 59, 61. The court did not explain what made the disputed section too "short," especially given the 4.35-mile and 36.5-mile stretches considered in *Utah*. App-99, 116. Nor did it explain how it could reach any conclusions "without the benefit of the extensive fact-finding done in *Utah*" as to the specific section's topography, history, impediments, and use and susceptibility to use for commerce purposes. App-100.

3. The United States seeks to rationalize the Montana court's lack of explanation by emphasizing a purported factual distinction—here "the relevant segments *had* been portaged *to allow commerce to continue uninterrupted*," while in *Utah* the non-navigable middle segment of Cataract Canyon "could not be portaged." U.S.Br. 12 (emphases added). That is demonstrably wrong. *Utah*'s Special Master found the river section *had* been portaged and its rapids "shot." 2dSApp-12 ("portaging" was "possible at most places"). But even that did not permit a finding of navigability because, as the Special Master likewise concluded for a portaged section of

the San Juan, the river sections could not be used as a highway of commerce. 2dSApp-14-17. So too here. Although Lewis and Clark trekked around the Great Falls, the historic record establishes they were forced to make an arduous, month-long, overland climb that was completely incompatible with "uninterrupted" water-borne commerce. Professors Br. 14-15; App-197-201, 232-35.

In any event, the Montana court's navigability analysis conflicts with precedent because PPL's objections were not limited to the impassable 17-mile Great Falls stretch but included other "length[y]" interruptions in navigability. U.S.Br. 15 (conceding point). As the dissent below recognized, PPL offered expert evidence challenging more than 125 miles of the Missouri, the entire Madison (approximately 133 miles), and approximately 235 miles of the Clark Fork.

4. Finally, the Montana court's decision deepens existing conflicts in the case-law because it relies on present-day recreational usage as evidence of navigability in 1889. The United States dismisses the conflict, claiming the cases "merely reach different outcomes after applying the relevant principles to different facts." U.S.Br. 16. But this Court has indicated that, to consider evidence of present-day usage, a court must make specific fact-findings that the river's original condition has not changed and present-day usage is comparable to statehood usage. Pet. 26-27. In contrast, the Montana court rejected expert evidence that the rivers had changed dramatically and concluded without qualification that "present-day recreational

use is *sufficient*" to establish navigability. App-54, 58 (emphasis added).

Contrary to the United States' suggestion, the decision below did not recognize the correct legal principle; it merely described its understanding of PPL's position. U.S.Br. 16 (citing App-20-21). Nor did it consider whether present-day recreational vessels are comparable to 1889 vessels. Designating present-day recreational fishing as "commerce" dispositive of navigability is "absurd[]," *George v. Beavark, Inc.*, 402 F.2d 977, 981 (8th Cir. 1968), for only "boats with a sufficient draft to be of any service" in practical and beneficial commerce are sufficient to support a finding of title navigability. *Oklahoma v. Texas*, 258 U.S. 574, 589-92 (1922); *Three Buoys Houseboat Vacations USA v. Morts*, 921 F.2d 775, 779 n.6 (8th Cir. 1990). And, of course, how any of this modern-day evidence could possibly overcome, on summary judgment, contemporaneous evidence of non-navigability, like the 1910 federal court decree, is inexplicable and unexplained.

III. The United States Understates The Federal Power Act's Preemptive Reach.

The United States argues that the State's attempt to collect retroactive back-rent under the Montana Hydroelectric Resources Act is not preempted. That view is entitled to no deference. *See Wyeth v. Levine*, 129 S. Ct. 1187, 1201 (2009). It also is non-responsive to PPL's arguments.

1. The Montana statute's rental-payment provision exists only to collect rent in connection with lease and licensing provisions that directly conflict with FERC's plenary authority over federal

power projects. Recognizing that conflict does not require second-guessing the Montana court's severability analysis. The severed portion of the problematic statute is itself preempted because it is designed to extract value from the federal license.

PPL has never argued that a "FERC license … turn[s] every 'assumption' underlying the license application into preemptive federal law." U.S.Br. 18. Instead, PPL's point is that Congress structured the federal scheme to allow FERC and the licensee to analyze the project economics and establish license conditions that could not be achieved if land rights were unresolved by the time of project construction. Specific statutory and regulatory provisions are designed to bring affected states into the licensing process. The federal scheme cannot work if, decades after the license is awarded, the State retroactively lays claim to thousands of acres long understood to be owned by others.

2. Ultimately, the reason the United States does not perceive a frustration of the federal scheme is the same reason it thinks this case is uncertworthy: sovereign immunity allows it to ignore the decision below, while continuing to collect charges premised on continuing federal ownership over lands for which the State also seeks rent. While such a system may be fine for the federal regulators in the short run, it ignores the plight of the regulated entity that must pay two sovereigns for the same land. It is hard to imagine a more concrete state-federal conflict than here, where PPL is being required to pay both the State and federal government for lands over which they are asserting competing claims of title.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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May 31, 2011 *Counsel for Petitioner*

SECOND SUPPLEMENTAL APPENDIX

TABLE OF
SUPPLEMENTAL APPENDICES

Appendix A

UNITED STATES
DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT
MONTANA STATE OFFICE
222 NORTH 32ND STREET
P.O. BOX 36800
BILLINGS, MONTANA 69107-6800

L 118
(932.2)

August 26, 1988

Dennis Hemmer, Commissioner
Department of State Lands
State of Montana
1625 Eleventh Avenue
Helena, Montana 59620

Dear Mr. Hemmer:

A recent article published in the July 1988, issue of "The Treasure State Surveyor," the official publication of Montana Registered Land Surveyors Association, is causing the Bureau of Land Management (BLM) some concern. This article, by Roy S. Henderson, Chief, of Resource Development Bureau, Lands Division of the Department of State Lands (DSL), describes how the State of Montana through the DSL is claiming ownership to the bed of 37 different streams within Montana based on their historic use for commercial navigation, thereby qualifying these streams as navigable waterways for title purposes.

The purpose of this letter is to place the State of Montana on notice that, based on available information, the BLM, as the agency responsible for protecting and managing some 8 million acres of federally-owned surface and all of the federally-owned minerals within the state, does not agree with the DSL's determination of the navigability of these waterways.

Our concern stems from the conflict between our two agencies which will inevitably arise in the future over the ownership of the bed of some of these waterways. At this point in time, the United States only recognizes portions of the Missouri, Yellowstone, and Big Horn Rivers within the State of Montana as being navigable for title related purposes. It is very possible, although we have not conducted any research as yet, that BLM has issued hundreds of mineral leases on lands to which the state now claims ownership. It is the responsibility of the BLM to defend the United States title to these minerals should the need arise. In addition, this action will have a disquieting effect on the title to thousands of parcels of private land through which these streams pass. Portions of or all of most of these streams were not meandered by the government surveyors while conducting the original surveys. This means that the acreage contained within the beds was not deducted from the legal subdivisions in which it is contained. Current owners' titles generally encompass complete legal subdivisions with no exceptions for the stream bed which might traverse the subdivision.

In conclusion, if the actions as reported in the above publications are recommended proposals by your

department, I would strongly recommend that you contact us to explore the situation. The effect on established land and minerals title could be enormous as it relates to the numerous ownerships involved.

Sincerely,
/s/
Ray Brubaker
State Director
Acting

cc: w/copies of publications
WO(320), MIB, Rm 3643
WO(720), PRE Bldg 201
Field Solicitor, Billings

Appendix B

PPL Montana, LLC
303 North Broadway, Suite 400
Billings, MT 59101-1255
Tel: 406.237.6900 Fax: 406.237.6901

May 20, 2011

VIA U.S. MAIL AND E-MAIL
(annualcharges@ferc.gov)

W. Doug Foster
Director, Financial Management Division
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

RE: PPL Montana, LLC, Company ID 015298
Payment of Annual Federal Land Charges for Bill Year 2010

Dear Mr. Foster:

PPL Montana has arranged for timely electronic payment in full (on the due date of June 3, 2011), of the 2010 Statement of Annual Charges for U.S. Lands that accompanied your email of April 19, 2011 (copy attached for reference). The purpose of this letter is to alert you that the State of Montana has asserted that it owns approximately 1300 acres of the lands covered by this statement. The State of Montana has obtained a state court judgment awarding the State compensation from PPL Montana for its use of all Montana-owned streambeds within PPL Montana's projects, which includes these approximately 1300 acres charged for

as "U.S. lands" by FERC, even though the State already receives substantial portions of PPL Montana's federal lands use and enjoyment charges pursuant to Section 17 of the Federal Power Act. *See PPL Montana, LLC v. State of Montana*, 229 P.3d 421 (Mont. 2010). This places PPL Montana in the untenable position of paying the State twice, both pursuant to its claim of ownership and through this payment premised on federal ownership.

As FERC is aware, PPL Montana is disputing the State's position and the state court judgment on the grounds that the United States is the owner of the 1300 acres (not the State of Montana), and has a Petition for Certiorari currently pending before the United States Supreme Court. *See PPL Montana, LLC v. State of Montana*, No. 10-218. Accordingly PPL Montana is making payment in full electronically (on the due date of June 3, 2011), in the amount of $571,196.91, on the invoice from the Commission.

Please contact the undersigned with any questions.

Sincerely,

/s/
Peter J. Simonich
Chief Operating Officer

cc: Anton Porter, Deputy Chief Financial Officer

Enclosure (Email from "AnnualCharges" dated Tuesday April 19, 2011 with its attachments)

* * *

From: AnnualCharges [mailto:annualcharges@ferc.gov)

Sent: Tuesday, April 19, 2011 9:36 AM

To: Randall, Pamela E.; sevidrich@pplweb.com

Subject: 2010 Statement of Annual Charges for U.S. Lands – PP&L MONTANA, LLC (015298) (20110418-61781)

Dear Regulated Entity,

The Federal Energy Regulatory Commission (Commission) is issuing revised FY 2010 Statement of Annual Charges for U.S. Federal Lands. Please disregard the bill issued on April 4, 2011. This revised bill(s) is replacing the bill issued on April 4, 2011 because the initial bill was incorrect. The Commission issued a Notice on April 15, 2011 (http://www.ferc.gov/industries/hydropower/annual-charges/fy2010-lands-re-issue.pdf) explaining the errors and how to proceed with your revised land charges. The revised due date for any amount due to the Commission for the FY 2010 U.S. Federal Charges bill is June 3, 2011. For those licensees that are owed a credit, the credit will be applied to your FY 2011 U.S. Federal Lands bill, which will be issued approximately June 3, 2011.

If you have any questions regarding the annual charges assessment process, or payment methods, please send an e-mail to annualcharges@ferc.gov. Please see General Payment Instructions for acceptable payment methods.

I apologize for any confusion and/or inconvenience this matter may have caused you.

Respectfully,

W. Doug Foster, Director

Financial Management Division

<<2010 Statement of Annual Charges For U.S. Lands – PP&L MONTANA, LLC (015298) (20110418-61781).pdf>>

FEDERAL ENERGY
REGULATORY COMMISSION
HYDROPOWER ANNUAL CHARGES
SUMMARY OF BILLS FOR U.S. LANDS
FOR BILL YEAR 2010

Payment must be received by: 06/03/2011	Company-id: 015298		
PP&L MONTANA, LLC PETE SIMENICH 303 NORTH BROADWAY SUITE 400 BILLINGS, MT 59101-1255			
Bill Number	Project-id	Amount Due	PLEASE INDICATE AMOUNT PAID
L00083-00	01869	4,578.76	
L00155-00	02188	553,173.58	
L00173-00	02301	13,444.57	
TOTAL AMOUNT DUE		$571,196.91	

Please indicate amount paid by project/bill by completing the last column intitled AMOUNT PAID. The total AMOUNT PAID should equal the total of the check(s) being submitted.

RETURN THIS COMPLETED FORM AND CHANGE OF ADDRESS FORM WITH REMITTANCE(S) TO:

Federal Energy Regulatory Commission
P.O. Box 979010
St. Louis, MO 63197-9000

Appendix C

EXCERPTS FROM THE *UNITED STATES V. UTAH* SPECIAL MASTER'S REPORT

Consideration of the use of the Colorado River by boats may be divided into two parts: (a) its use from the Junction of the Grand and the Green River to the end of Cataract Canyon at about Mile 176 above Lees Ferry; and (b) its use from Mile 176 or thereabouts down to the Utah-Arizona boundary line, a stretch of about 150 miles. I have taken as the point of division Mile 176 (which is at the foot of Millecrag Bend), since the end of Cataract Canyon is marked on the Government's Topographic Survey map of 1921 as at Mile 176 (Complainant's Exhibit 10). The last rapid in the Canyon, however, is at Mile 181.

(a) Cataract Canyon.

The section of the Colorado River, for its first 40 miles from its beginning at the junction of the Grand and Green Rivers at Mile 216.5 above Lees Ferry down to Mile 176, differs materially in its conditions, from any other section of the Rivers involved in this suit. Only a brief consideration need be given of the evidence, and the question of the navigability of this section of the River may be disposed of before considering the navigability of the remainder of the River south to the Utah-Arizona boundary line. In this section, the descent is from an elevation of 3879 feet to 3465, or 414 feet in 40.5 miles – an average of about 10 feet per mile. It consists of a series of rapids, long and short, which have been variously

estimated by witnesses as from 40 to 70 in number, according to the stage of water when they were observed and according to individual judgment in separating or combining the rapids into distinct or continuous stretches. These rapids vary in steepness of gradient and violence of flow from 15 feet per mile to 100 feet per mile. It is useless to give additional figures, as the evidence is conclusive as to the dangerous conditions presented by the rapids. In addition the bed of the River is a tumbled mass of boulders and rocks which in combination with the swift current produce swirling whirlpools, sucking holes in the water, and high and rough waves. The conditions of the River through this Cataract Canyon can only be adequately visualized by consulting the excellent photographs introduced in evidence and found in bound volumes constituting Complainant's Exhibits 11 B, 24-45, 234-248.

The account of the boat trips made on the Green and Grand Rivers (heretofore given in my Report supra pp. 60-98) includes substantially all boats which are known to have succeeded in passing through Cataract Canyon; but there have been many instances of failure of passage and of the death of the adventurers, as to which no one has ever been able to make a record.

The stories of those who have passed through this Canyon, as told on the witness stand in this suit and in their books, are replete with thrilling adventure, hazard to life, hair-breadth escapes, and injury to and destruction of boats. As a rule, the passage has been made in boats of special construction, with air-tight compartments at bow and stern; and to make the passage without wearing

life-preservers is dangerous. Some men have shot all the rapids; others have made the passage by portaging the contents of the boats and "lining" the boats themselves through some of the rapids (i.e., by letting the boats down by means of ropes tied to bow and stern and manipulated by the men on the bank). Such portaging and "lining" is possible at most places in the Canyon owing to the fact that on the water side at the foot of the Canyon walls, there are talus slopes or banks made up of gravel and jumbled rock, though frequently of huge size over which one may travel, with difficulty. At Dark Canyon rapids, however, the Canyon walls close in, without any shore between the walls and the River.

Many of the men who have come through the Canyon have had special experience in the operation of boats; and those who have had no previous experience with these or other rapids have owed their passage to courage and considerable good luck.

No motor boat has ever gone through Cataract Canyon and in my opinion no such boat could be navigated through it under power. No articles of commerce, other than supplies for the men making the passage, have ever been taken through the Canyon in boats.

In view of the above facts, I find that the 40 miles of Cataract Canyon and Dark Canyon, i.e., the first 40 miles of Colorado River from its beginning at the junction of the Grand and Green Rivers and down to Mile 176 above Lees Ferry were, in 1986, non-navigable. I do not understand that the State in this suit makes any very earnest claim that this section of the Colorado River was in fact navigable in

1896, but the State contends that even if this section were not navigable, nevertheless, if the Master shall find that the remainder of the River was navigable, he should also find that the River was as a whole (including this section) navigable, and that he should not split the River up into parts.

* * *

I am of the opinion and accordingly find as follows:

(1) The Colorado River south from the confluence of the Green River with the Grand River at Mile 216.5 above Lees Ferry down to the end of Cataract Canyon at Mile 176 above Lees Ferry, was, on January 4, 1896, not capable or susceptible of being used in its natural and ordinary condition as a highway for commerce over which trade and travel might be conducted in the customary mode of trade and travel on water.

(2) The Colorado River, on January 4, 1896, was in fact and in law a non-navigable water of the State of Utah from the confluence of the Green River with the Grand River at Mile 216.5 above Lees Ferry down to the end of Cataract Canyon at Mile 176 above Lees Ferry; and in consequence title to the bed of the River between such points was vested on that date in the United States of America, except so far as the United States of America may have theretofore made grants of said bed.

(No. 14, Original, pp. 125-127, 153; alternative stamped pages 156-158, 193.)

* * *

(c) Velocities, Gradient, and Rapids [on the San Juan river from the Mouth of Chinle Creek to its Confluence with the Colorado River].

* * *

I find that, in 1896, water conditions existed which should be termed "rapids" at the following points at least, viz, at the Narrows (about Mile 124), at Gypsum Creek (Mile 113.80), above at or below Slickhorn Creek (Miles 79, 77, 73) at Grand Gulch (Mile 70), at Piute Creek (Miles 21, 20), at Thirteen-Foot Rapid (Miles 11, 10). The actual drop at these points varied from 3 to 17 feet and from a drop of 16 feet per mile to a drop of 72 feet per mile. At other points there were conditions which might or might not be described as rapids, according to the witnesses and according to the time of year when they were seen; but even at these other places, the actual drop ranged from 3 to 9 feet and from 18 to 40 feet per mile.

The amount of impediment to navigation occasioned by these rapids at a low stage of water has been described by Miser and other members of the 1921 Survey party in their testimony, and in substantially the same manner by Miser in his report from which I quote (pp. 50-52) (and it is to be noted that the rapids will naturally create more of an impediment at high water, though they may be reduced in number and though their depth may be increased).

> "Most of the rapids are produced by boulder bars, at the mouths of side canyons. … The

> rapids over such bars are known as boulder rapids. … Others occur where the channel runs between close canyon walls … . The boats of the Trimble expedition were run through most of the rapids. In shooting the worst ones, Loper, the boatman, was the only member of the party to stay in the boats; the other men walked along the banks around such rapids. The loaded boats were nosed one at a time through a few rapids by the boatmen, who in wading held on to the bow and guided it downstream ahead of him. Both the boats and the camp equipment were portaged around the Thirteen-Foot Rapid (at Mile 10-11). The equipment was portaged around a rapid 3 miles above the mouth of Slickhorn Gulch (at Mile 77) and then the boats were run empty through the rapid. The equipment was portaged around the first and second rapids at the mouth of Piute Canyon (at Mile 20-21); the empty boats were nosed through the first rapid but were run through the next. The loaded boats were run through a small rapid half a mile above the mouth of Johns Canyon at Mile 82-83, but one of the boats containing two members of the party not only narrowly missed striking the canyon wall but struck a boulder and was burst on one side from bow to stern. …"

There was testimony that miners using this River occasionally were obliged to "line" their boats around or through the rapids. Frank H. Karnell

testified to a rather remarkable method of running rapids (Record 4468), stating that sometimes "it was necessary for me to strip and act as a rudder to the boat and shoot the rapids; in one or two places the other men would catch the boats and hold them below, after I got through."

W.E. Mendenhall, an old river-man who appeared as a witness defined rapids as follows (Record 3453): "a rapid is rough water, more or less dangerous, filled with large rocks, water running down very rapidly and rough"; and he testified to the presence of rapids in the upper canyon about 6 to 10 miles below Comb Wash (Record 3457). "It is pretty swift through these canyons. … These rapids occurred quite frequently."

* * *

The number of difficult rapids, with steep and rapid drops … made it impossible, in my opinion, for any boat to navigate safely unless conducted with great caution and by expert boatmen; and even then boats must ordinarily be "lined" or portaged or their cargoes portaged at several places.

* * *

I am of the opinion and accordingly find as follows:

(1) The San Juan River from the mouth of Chinle Creek at Mile 133 above the confluence of the San Juan River and the Colorado River down to the mouth of the San Juan River at such confluence was, on January 4, 1896, not capable or susceptible of being used in its natural and ordinary condition as a highway for commerce over which trade and travel

might be conducted in the customary mode of trade and travel on water.

(2) The San Juan River, on January 4, 1896, was in fact and in law a non-navigable water of the State of Utah from the mouth of Chinle Creek at Mile 133 above the confluence of the San Juan River and the Colorado River down to the mouth of the San Juan River at such confluence; and in consequence title to the bed of the River between such points was on that date vested in The United States of America, except so far as the United States of America may have theretofore made grants of said bed.

(No. 14, Original, pp. 166, 170-171, 181-182; alternative stamped pages 211, 221-222, 227-228.)

Appendix D

SUMMARY OF REPORT, MAPS, AND OTHER MATERIALS PROVIDED TO THE UNITED STATES IDENTIFYING LANDS OWNED BY THE FEDERAL GOVERNMENT ON THE MADISON, UPPER MISSOURI, AND CLARK FORK RIVERS

In connection with PPL's petition for certiorari, PPL's outside counsel (Holland & Hart LLP) prepared a 20-page federal ownership report, along with large, color-coded maps and other related materials, to identify, by section, township, and range descriptions, the property interests, including surface and mineral interests, owned by the United States abutting the Madison, Clark Fork and upper Missouri Rivers in Montana. The report, maps, and other materials were prepared based on, among other things, information gathered from the master title plats, serial register pages, and grant documents (patents) maintained by the Bureau of Land Management, Billings District Office. The report and maps were prepared assuming—in agreement with the 1988 letter from the U.S. Department of the Interior to the Montana Department of State Lands—that the Upper Missouri, Madison, and Clark Fork rivers are not "navigable for title related purposes."

These materials were shared with the United States and personnel from several federal agencies, including the Department of Justice, Environmental and Natural Resources Division. Given the materials' bulk, however, they are not easily

reproduced in a booklet-form appendix. Accordingly, the following provides a summary of some of the information shared with the United States. Upon the Court's request, PPL would be pleased to submit the maps, federal ownership report, and related materials to the clerk's office.

1. The Montana court's decision puts at risk millions of acres of valuable surface and subsurface mineral acres managed by the federal land-owning agencies throughout Montana, including tens or hundreds of thousands of acres of riverbed lands otherwise owed by the United States (or U.S. patent holders) that the Montana court has now adjudicated to be owned by Montana, or which are on the State's Navigable Rivers List, within the following:

- 8 million surface acres and more than 20 million subsurface mineral acres managed by the Bureau of Land Management ("BLM").

- 1.2 million surface acres managed by the National Park Service ("NPS").

- 1.2 million surface acres managed by the U.S. Fish & Wildlife Service.

- 16.9 million surface acres managed by the United States Forest Service ("USFS").

2. The Montana court's decision awarding title to the riverbeds to Montana competes with the United States' title as riparian owner of the same beds within five national forests, a BLM

wilderness area, BLM-managed Public Domain surface and mineral lands, and Yellowstone National Park, all of which the three rivers flow through.

- Madison River: Beaverhead-Deerlodge National Forest, Gallatin National Forest, the Lee Metcalf Wilderness Area, and Yellowstone National Park.

- Missouri River: Helena National Forest, Public Domain surface and mineral lands.

- Clark Fork River: Kaniksu National Forest. Lolo National Forest, Grant-Kohrs Ranch National Historic site.

3. "Title" to tens of thousands of acres of riverbed lands between the high water marks on the upper Missouri, Madison, and Clark Fork Rivers otherwise owned by the United States (or its patent-holders) has been adjudicated by Montana's highest court to be owned by Montana. *PPL Montana v. Montana,* 229 P.3d 421, 449, 460 (Mont. 2010). These lands include:

- hundreds of acres of federal BLM title to the surface and subsurface of upper Missouri riverbeds between Fort Benton and Great Falls, including oil & gas interests in a currently producing area. This reach of the river contains PPL's Black Eagle, Rainbow, Ryan, Cochrane, and Morony dams.

- thousands of acres of federal BLM/USFS title to the surface and subsurface of the upper Missouri riverbeds between Cascade and Three Forks, including the riverbed lands belonging to the Helena National Forest, and those connected to BLM's "Chain-of Lakes Complex," which include the following federal BLM Recreation Areas: Holter Dam, Holter Lake, Log Gulch, Departure Point, Beartooth Landing, Devil's Elbow I and II, and the Upper Toston Recreation Site. This reach of the river contains PPL's Holter and Hauser dams, and also the riverbed acres underlying the U.S. Bureau of Reclamation's Canyon Ferry dam and reservoir.

- thousands of acres of federal BLM/USFS title to the surface and subsurface of the Madison riverbeds between the Wyoming border and Three Forks, including riverbed lands within the Beaverhead-Deerlodge and Gallatin National Forests, and within the BLM's Lee Metcalf Wilderness Area, including the Beartrap Canyon National Recreation Trail. The parts of the Madison River deemed by the Montana court to be owned by the State include the river stretches that contain PPL's Hebgen and Madison dams, as well as riverbed acres within the western edge of Yellowstone National Park.

- thousands of acres of federal BLM/USFS title to the surface and subsurface of riverbeds between Deer Lodge and the Idaho border on the Clark Fork River. The river area declared

> navigable for title purposes by the Montana court that includes PPL's Thompson Falls dam also grants riverbed ownership to Montana within the NPS's Grant Kohrs Ranch National Historic Site, and to riverbeds within the Kaniksu and Lolo National Forests, and along recreation areas managed by BLM.

4. The Montana court's decision raises serious concerns for potentially thousands of private landowners who since 1889 have received lands from the federal government by patent, grant, or decree, including (for example) the 1910 Federal Decree regarding Thompson Falls that decreed fee title to the riverbeds beneath PPL's Thompson Falls dam to be in PPL's federal patent-holding predecessor-in-title.